NO. 442 MISC.

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Supreme Court of the United States

JEROME HENTSCHEL, CECELIA HENTSCHEL,
Petitioners,

vs.

BABY BATHINETTE CORP. and SEARS, ROEBUCK AND COMPANY,
Defendants,

and

WHITE METAL ROLLING & STAMPING CORP.,
Third-Party Defendant.

Defendants' Brief in Opposition to Petition for Writ of Certiorari.

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THE REPORTER COMPANY, INC., Walton, N. Y.—1955

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DEFENDANTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The petitioners, Jerome and Cecelia Hentschel, have petitioned this court for a writ of certiorari to review a judgment of affirmance by the United States Court of Appeals for the Second Circuit, which affirmed by a divided court a judgment in favor of the defendants of no cause of action after a trial by jury in the United States District Court for the Western District of New York. The judgment of affirmance by the United States Court of Appeals was entered in the office of the clerk of that court on the 27th day of July, 1954. An order denying an application for a rehearing by the petitioners was entered in the office of the clerk of that court, on the 25th day of August, 1954.

The prevailing and dissenting opinions of the Court of Appeals are reported in 215 Fed. 2d 102.

Apparently the petitioners are invoking the jurisdiction of this court, pursuant to United States Code, Title 28, Section 1254, Rules 19-27 of the rules of this court. The

precise question decided by the Court of Appeals from which an appeal is sought by writ of certiorari is: Did the Trial Court err in its application of the common-law rules of the State of Michigan?

It is the position of the defendants that it did not err and that the petitioners have not shown grounds for the granting of a writ of certiorari under the provisions of Rule 19, Subdivision 1-b, of the rules of this court.

Facts.

The plaintiff, Jerome Hentschel, on January 14th, 1948, purchased from defendant, Sears, Roebuck and Company, a Baby Bathinette for use by him and his family in his home, at 9-B Churchill Drive, Ryerson Heights, Muskegon, Michigan. This bathinette was manufactured by Baby Bathinette Corporation of Rochester, New York, and, in turn, sold by it to Sears, Roebuck and Company for resale to the public. The bathinette had been used by the plaintiffs in their home from January 14th, 1948, to January 12th, 1949.

A "Baby Bathinette" is what the name implies, being a small stand with waterproof plastic top, which holds water in which a baby may be bathed. This particular bathinette had four crossed legs forming an "X" to support the plastic top. These legs were made of a magnesium alloy designated "MF." The legs made of this magnesium alloy were hollow tubes, one inch square, with a thickness of the metal of .049 (p. 380). The "MF" alloy is composed of 96.83 per cent magnesium; .96 per cent manganese; 1.39 per cent aluminum, and .82 per cent zinc and silicon (p. 419).

These extruded square tubes from which the legs are fabricated were made by the third-party defendant, White

Metal Rolling & Stamping Corp., and were sold by it to Baby Bathinette Corporation, manufacturers of the finished bathinette.

The plaintiffs lived in a four-room apartment, which was part of a government housing project in Muskegon, Michigan. The apartment consisted of kitchen, living room, two bedrooms, and a bath. There were two entrances, one through the kitchen and the other at the opposite end of the apartment through the living room (p. 121). When entering the apartment through the kitchen door, one continues on to a hallway at the far end of the kitchen. This hall leads to the left, and on one side is the bathroom and on the other side the children's bedroom. Both of these two rooms are on the left exterior wall of the apartment when entering through the kitchen. On the right exterior wall are the master bedroom and the living room. No doors separate the kitchen, hallway, and living room, all being open archways (pp. 339-342).

There was no central heating plant in this apartment house and each apartment, including the plaintiffs' herein, was heated by a coal stove placed in the living room, and an open flame gas water heater situated in the bathroom, plus, of course, any heat emanating from the kitchen stove (p. 352).

On January 12th, 1949, prior to the occurrence of the fire, the plaintiff, Cecelia Hentschel, arose from her bed and prepared breakfast for her two older children, one boy aged five years, the other a girl aged three years. After they had eaten, they were left playing in the living room and the plaintiff, Cecelia Hentschel, returned to her bed (p. 28). Within a matter of a very few seconds after she had returned to her bed with her husband, Jerome Hentschel, in the master bedroom, the fire broke out in the bathroom (p. 29). The plaintiffs in their complaint specify only one complaint of negligence on the part of

the defendants, which was that the bathinette caused the fire by reason of negligent construction and the placing therein of improper chemicals and ingredients.

Three bases of recovery are claimed by the plaintiffs, and are:

1. The Baby Bathinette ignited by spontaneous combustion.
2. The bathinette was ignited by proximity to exposed hot water pipes in the bathroom.
3. A fire started from some unknown source which ultimately ignited the bathinette.

The Trial Court charged the jury that there could be no recovery if the bathinette was ignited by a fire from some other source and left as questions of fact for the jury as a basis of recovery by the plaintiffs whether the bathinette was ignited by spontaneous combustion or proximity to the exposed hot water pipes.

POINT I.

The Court properly applied the common-law rules of the State of Michigan to the issues raised.

It was not clear, either in the United States District Court or the United States Court of Appeals, whether plaintiffs' counsel claimed the law of Michigan to be different or the same as that of New York and, as a result, the case has been argued, briefed and decided in both lower courts on the law of both the States of New York and Michigan. The applicable rule of law has been clearly and succinctly stated in *Noone v. Perlberg, Inc.*, 268 App. Div. 149, aff'd 294 N. Y. 680, in which the Court in an

opinion by Dore, J., in the Appellate Division, at page 152, stated:

"'The rule in this state is now settled that when a manufacturer sells an inherently dangerous article for use in its existing state, the danger not being known to the purchaser and not patent, and notice is not given of the danger or it cannot be discovered by reasonable inspection, the manufacturer is legally liable for personal injuries received by one *who uses the manufactured article in the ordinary and expected manner* (*Thomas v. Winchester*, 6 N. Y. 397; *MacPherson v. Buick Motor Co.*, 217 N. Y. 382; *G. C. P. Fire Relief Assn. v. Sonneborn Sons*, 263 N. Y. 463, 468; *Crist v. Art Metal Works*, 230 App. Div. 114, 117, aff'd 255 N. Y. 624; *Comrs. State Insurance Fund v. City Chemical Corp.*, 290 N. Y. 64; 4 Shearman & Redfield on Negligence (Rev. ed.), §654 *et seq.*; Restatement, Torts, §395 *et seq.*).' (Italics supplied.)

"In the Restatement of Law of Torts, Section 388, the rule is stated as follows:

"'§388. Chattel Known to Be Dangerous for Intended Use.

"'One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

"'(a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied;

"'(b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and

> "'(e) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so.'"

The Court in its charge to the jury stated that the plaintiffs could not recover under these rules of law unless it was established that the bathinette was ignited by spontaneous combustion or from proximity to exposed hot water pipes in the bathroom. This constituted a determination by the Trial Court as a matter of law that (a) this was not a foreseeable risk, which the defendant should have guarded against, or (b) assuming such a risk foreseeable, there was insufficient evidence to create a question of fact whether the hydrogen burned in rooms of the apartment other than the bathroom, or (c) that the bathinette was not an inherently dangerous instrumentality.

There has been no proof offered by the plaintiffs that the bathinette was in any way defectively manufactured, but it is claimed that the bathinette properly manufactured was an inherently dangerous instrumentality, in that it caused an unreasonable and foreseeable risk of unwarranted danger to users of the bathinette in the "ordinary and expected manner" of user (*Noone v. Perlberg, Inc.*, 268 App. Div. 149).

Some typical cases in which the manufacturer has been exonerated from all liability on the basis that the article is, as a matter of law, not inherently dangerous, are:

Hall v. New York Tel. Co., 214 N. Y. 49, in which the defendant's employees left a bottle of denatured alcohol by the side of the highway; children played with it and they were injured. It was not held "not of necessity dangerous."

In *Morse v. Buffalo Tank Corp.*, 280 N. Y. 110, the defendant allowed a pan to remain under the faucet of a

gasoline drum, which accumulated the dripping from the drum. Some boys took the gasoline, threw it on a fire, and were injured. The Court in that case stated: "While highly inflammable, the use of gasoline does not place the case at bar within the exception concerning the use of inherently dangerous materials."

In *Beickert v. G. & M. Laboratories*, 242 N. Y. 168, the plaintiff was burned by igniting pieces of film, which had been picked up in the rear of the defendant's plant. The Court in this case held "these pieces of film were not inherently dangerous and only became so when they were ignited."

In *Popular v. Bourjois, Inc.*, 272 App. Div. 74, aff'd 298 N. Y. 62, the plaintiff injured her finger on a sharp point of a metal star on a cosmetic box, in which the Court held "as a matter of law an article such as a Bourjois box may not be regarded as inherently dangerous, a menace to health and life." It is worthy of note, in this case the Court considered substantially the same proposition as exists in the case at bar.

In order for this Court to grant a petition for a writ of certiorari under Rule 19, Subdivision 1-b, of the rules of this court, it must be established that the Court of Appeals of the Second Circuit "has decided an important state or territorial question in a way in conflict with applicable state or territorial law." It is implicit in all proceedings in this case from the Trial Court up to the petition for writ of certiorari that the rule of law previously set forth is the accepted law, both of the States of New York and Michigan, with respect to an inherently dangerous article. It is also established by the New York cases cited that the Court has the unquestioned power to rule, as a matter of law, that a particular article is not inherently dangerous, as did Judge Burke in the United

States District Court for the Western District of New York. Certainly it cannot be claimed that the Trial Court or the affirmance by the Court of Appeals for the Second Circuit violated in any way the basic rules of common law as determined by the courts of the States of New York and Michigan, and his application of this rule of law and the affirmance of such application by the United States Court of Appeals is certainly not in conflict with applicable state law.

POINT II.

The petition for writ of certiorari should in all respects be denied.

Respectfully submitted,

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